

ST 98-13

Tax Type: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE HEARINGS DIVISION  
CHICAGO, ILLINOIS

---

---

THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS,  
Petitioner

v.

JOHN DOE , as responsible officer  
of ABC Corporation

No.

IBT No.

NPL No.

Linda K. Cliffl  
Administrative Law Judge

---

---

**RECOMMENDATION FOR DISPOSITION**

**APPEARANCES:** George Smith and William Romanoff for the taxpayer; Richard Rohner, Special Assistant Attorney General, for the Department of Revenue.

**SYNOPSIS:**

This matter comes on for hearing pursuant to JOHN DOE's (hereinafter "taxpayer") protest of Notice of Penalty Liability ("NPL") Number XXXX issued by the Department against him on September 21, 1994 as responsible officer of ABC Corporation (hereinafter referred to as "ABC I"). The NPL represents a penalty liability for Use Tax admitted by ABC as due to the Department for the period July 1981 through September 1988, but which is unpaid.

The issues to be resolved are 1) whether the taxpayer was a responsible officer of ABC Corporation and thereby required to collect, truthfully account for and pay over the taxes involved and 2) whether the taxpayer willfully failed to collect, truthfully account for and pay over such taxes.

A hearing in this matter was held on August 27, 1997. Following the submission of all evidence and a review of the record, it is recommended that the NPL be finalized as revised in accordance with this recommendation.

## **FINDINGS OF FACT:**

1. The Department's *prima facie* case was established by the admission into evidence of the Notice of Penalty Liability ("NPL"). The NPL dated September 21, 1994, reflects a total liability due and owing in the amount of \$46,227.58 for the period July 1981 through September 1988. (Dept. Ex. No. 1)
2. ABC Corporation ("ABC I") was voluntarily dissolved in 1988. (Tr. p. 23)
3. ABC I was a contractor which did sewer work for local municipalities. (Tr. p. 14)
4. Taxpayer owned the stock of XYZ Corporation. In 1988 XYZ acquired the name of ABC Corporation, and changed its name to ABC Corporation ("ABC II"). (Tr. pp. 24-25, 48) Taxpayer did not pay to acquire the name. (Tr. p. 48)
5. XYZ Corporation was in the same line of business as ABC I and worked on some of the same projects as ABC I. (Tr. p. 27) Taxpayer acquired the ABC Corporation name to gain name recognition when bidding government jobs. (Tr. p. 30)
6. The Department of Revenue audited ABC II and as a result of auditing ABC II sought to audit ABC I. ABC I had been dissolved 5 years prior to this audit and no books and records could be found. The Department's auditor, with the agreement of Gust Dickett, the attorney and accountant for both ABC I and ABC II, used the records of ABC II to estimate the liability of ABC I for use taxes which were deemed to be owing for fixed asset purchases and purchases of supplies. (Tr. pp. 11-13) The additional tax liability was based on fixed asset purchases in the amount of \$274,067.15, and supply purchases in the amount of \$84, 977.51. (Taxpayer Ex. No. 2)
7. Prior to the audit, no use tax returns had ever been filed by ABC I, nor did ABC I have an IBT number. (Taxpayer Ex. No. 2, Tr. pp. 14-15) On the conclusion of the audit, Mr. Dickett signed a first and final return on behalf of ABC I admitting to the liability. (Tr. p. 13)

8. Taxpayer was the field superintendent of ABC I. (Tr. p.49) His job was to oversee the field operations and approve invoices for payment. (Tr. pp. 49-50, Taxpayer Ex. No. 3<sup>1</sup>) Taxpayer did not sign tax returns. (Tr. p. 52) Taxpayer had check-signing authority. (Taxpayer Ex. No. 3)
9. Subsequent to the audit, paid bills were discovered which showed that ABC I had paid use taxes on all of the purchases of fixed assets that it made during this period. (Tr. pp. 16-17, Taxpayer Ex. No. 3)

## **CONCLUSIONS OF LAW:**

The penalty at issue herein is based upon the use taxes which were projected for the period July 1981 through September 1988. After audit, the corporation submitted to the Department a “first and final” tax return without payment for the amount stated therein. The Department seeks to impose personal liability on the taxpayer pursuant to Section 13.5 of the Retailers' Occupation Tax Act, which provides:

Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed in accordance with Section 3 of this Act and who willfully fails to file such return or to make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the corporation, including interest and penalties thereon....  
35 ILCS 120/13.5.

There is a question as to what the taxpayer's role was in the corporation. He admits to being an employee of ABC I, the field superintendent. He disputes the Department's contention that he was the president of ABC I, however. The Department introduced under the Certificate of the Director a document purportedly retrieved from Lexis-Nexis, the legal research service, which identifies Mr. Hayes as the president of ABC Corporation which was dissolved on October 18, 1988. This evidence can be given no weight. It is not an official document from the Secretary of State, nor is it from the Department's own records. In light of the potential for confusion with two corporations with the same name, such third party documentation is not credible.

---

<sup>1</sup> Also referred to as Taxpayer's Exhibit No. 1. Taxpayer introduced a total of two exhibits. The invoices were marked and admitted as Taxpayer's Exhibit No. 3, but later were referred to as Taxpayer's Exhibit No. 1.

The fact remains that during the relevant period taxpayer was an employee of the corporation.

According to the statute, it is not necessary to be an officer of the corporation for liability to be imposed. If, as an employee, the individual has the control, supervision or responsibility of filing returns and making payment of the tax, and willfully fails to file such return or to make such payment, he will be subject to personal liability. In determining whether an individual is a responsible person the courts have indicated that the focus should be on whether that person has significant control over the business affairs of a corporation and whether he or she participates in decisions regarding the payment of creditors and the disbursement of funds. *See, e.g., Monday v. United States*, 421 F.2d 1210 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970). Liability attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the government. *Id.*

As field superintendent, Mr. DOE testified that he had no knowledge of tax returns. While ABC I filed no use tax returns, no other tax returns were introduced, such as income tax or payroll tax returns, which show who had responsibility for signing the tax returns. However, taxpayer introduced into evidence two checks, both of which were signed by Mr. DOE. While he testified that he had no recollection of having check-signing authority for ABC I, these two checks show that he did have signature authority for corporate checks. Further, Mr. DOE had the authority to approve payment of invoices. A number of the invoices submitted into evidence by the taxpayer have Mr. DOE's signature on them approving them for payment. The evidence, therefore, shows that taxpayer was in a responsible position in which he should have known whether the tax returns were filed and the liabilities paid. *See Monday v. United States*, 421 F.2d 1210 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970); *Mazo v. United States*, 591 F.2d 1151 (5th Cir. 1979) (responsibility is a matter of status, duty and authority, not necessarily knowledge). Since Mr. DOE was an employee of the corporation and was in a position to direct that the taxes be paid, he is a responsible employee pursuant to Section 13.5. Based on the foregoing, I believe that the taxpayer has not presented sufficient evidence to rebut the Department's *prima facie* case regarding whether he was a responsible party.

The second element which must be met in order to impose personal liability is the willful failure to pay the taxes due. The Department presents a *prima facie* case for willfulness with the introduction of the NPL into

evidence. Branson v. Dept. of Revenue, 168 Ill.2d 247 (1995). The burden, then, is on the responsible party to rebut the presumption of willfulness.

Taxpayer has introduced a great number of invoices for fixed assets during the audit period which all show that ABC I paid use tax to the supplier. The underlying use tax liability has been admitted to and therefore is not at issue in this proceeding. The fact that tax was paid on the purchase of fixed assets during this period, however, does go to willfulness on the part of the responsible party. It is axiomatic that a taxpayer cannot have willfully underpaid tax when all the taxes have been paid.

The audit, however, based the use tax liability on a projection of purchases of both fixed assets and supplies. No similar invoices relating to supplies purchases was introduced by the taxpayer. Since the taxpayer was unable to present any evidence which would rebut the Department's *prima facie* case regarding the purchase of supplies, I must find for the Department on that portion of the NPL.

**WHEREFORE**, for the reasons stated above, it is my recommendation that the Notice of Penalty Liability be disallowed as to the fixed asset purchases and affirmed as to the purchase of supplies.

Date:

---

Linda K. Cliffel  
Administrative Law Judge